SUPREME COURT, U.S.
FILED

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No. 93-94-83

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IN THE

Supreme Court of the United States

October Term, 1993

FRANK DESALVO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "narrow exception" to the federal use immunity statute (18 U.S.C. §6001 et seq.), recognized in United States v Apfelbaum, 445 U.S. 115 (1980), permits the wholesale use and derivative use of a defendant's immunized statements to establish the defendant's non-contemporaneous perjury and obstruction of justice?

2. Whether the use and derivative use of a defendant's immunized statements can be harmless error?

LIST OF PARTIES

The parties to the proceedings below were Petitioner Frank DeSalvo and the Respondent, United States of America.

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

FRANK DESALVO,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Frank DeSalvo respectfully prays that a Writ of Certiorari be issued to review the Order of the United States Court of Appeals for the Second Circuit, entered on April 8, 1994, which affirmed the judgment of the United States District Court, Eastern District of New York (Sifton, J.), entered on April 30, 1993.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported but appears in the Appendix as 1a-18a. The Court of Appeals in its April 8, 1994 Order affirmed the final judgment of the United States District Court, Eastern District of New York, convicting Petitioner of Perjury (4 counts), in violation of 18 U.S.C. §§ 1623(a) and 3551, et seq., and obstruction of justice, in violation of 18 U.S.C. §§ 1503 and 3551, et seq., upon a jury verdict, and sentencing him under the United States Sentencing Guidelines to the custody of the Bureau of Prisons for thirty months, to be followed by two years' supervised released.

The Order of the Court of Appeals, dated May 31, 1994, denying the petition for rehearing, and noting that no judges of the court requested a vote on the

suggestion for rehearing in banc, appears in the Appendix as 19a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

The Order of the Court of Appeals sought to be reviewed was filed on April 8, 1994. The Petition for Rehearing, With a Suggestion for Rehearing In Banc, was denied by Order dated May 31, 1994. Petitioner was permitted to remain at liberty pending a disposition of his Petition for a Writ of Certiorari by Order of the United States Court of Appeals, Second Circuit, filed June 13, 1994.

This Petition for a Writ of Certiorari is filed within the time prescribed by U.S. Sup.Ct. Rule 13, 28 U.S.C.A., and Rule 41(b) of the Federal Rules of Appellate Procedure.

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment:

"No person *** shall be compelled in any criminal case to be a witness against himself ***."

STATUTES INVOLVED

18 U.S.C. § 6002:

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or to provide other information in a proceeding before or ancillary to -

(1) a court or grand jury of the United States,

***

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

STATUTES INVOLVED (Con't)

18 U.S.C. §1623(a):

"Whoever under oath *** in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration *** shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503:

"whoever corruptly *** endeavors to influence, intimidate, or impede any grand or petit juror *** or corruptly *** influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration or justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner Frank DeSalvo was accused by a federal grand jury of committing the crimes of perjury (six counts), in violation of 18 U.S.C. §§ 1623(a) and 3551 et seq., and obstruction of justice (6 counts), in violation of 18 U.S.C. 1503 and 3551 et seq. The charges stemmed from the testimony he gave on three separate occasions as an immunized witness before the grand jury investigating allegations that the Morris J. Eisen, P.C. law firm, and several employees, including lawyers, investigators and the office manager, had violated the anti-racketeering statute (18 U.S.C. § 1962[c]) and had conspired to violate the anti-racketeering statute (18 U.S.C. § 1962[d]), in connection with the firm's representation of personal injury plaintiffs in eighteen lawsuits filed in the Supreme Court of the State of New York. The charges also stemmed from Petitioner's

immunized testimony given as a government's witness at the trial of United States v Morris J. Eisen, et al.[1] Petitioner was a trial lawyer employed by Morris J. Eisen, P.C., for a short time during the RICO conspiracy alleged in the Eisen indictment, but was not charged with racketeering or conspiracy.

After the Eisen defendants were convicted and sentenced, the government presented evidence to another grand jury, sitting in the Eastern District of New York, concerning Petitioner's alleged perjury and obstruction of justice on the three separate dates before the Eisen grand jury, and at the subsequent Eisen trial. To obtain an indictment of Petitioner, the government introduced into evidence the complete transcripts of

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[1] See United States v Eisen, 974 F.2d 246 (2d Cir. 1992), cert. denied, __U.S.__ (1993).

Petitioner's immunized Eisen grand jury testimony and his immunized Eisen trial testimony. Based on that and other evidence presented, the grand jury charged Petitioner with perjury (six counts), and obstruction of justice (6 counts), allegedly committed before the Eisen grand jury and at the Eisen trial.

Prior to his trial on these charges, the Petitioner moved, pursuant to Kastigar v United States, 406 U.S. 441 (1972), for an order dismissing the indictment on the grounds that the government used and derivatively used his immunized grand jury and trial testimony to obtain his indictment for perjury and obstruction of justice. In support of his motion, Petitioner identified three areas in which his immunized testimony was improperly used.

First, Petitioner complained that all of his immunized testimony (regardless of

its truth) given on three separate dates concerning, inter alia, three discrete personal injury actions, which were later included in some of the twenty-six predicate acts listed in the Eisen indictment, and all of his immunized testimony at the Eisen trial concerning, inter alia, the three personal injury actions, were admitted into evidence before the grand jury which ultimately indicted him. Similar to Rule 404(b) evidence[2], the government was able to establish successive acts of perjury and obstruction of justice before the Eisen grand jury and at the Eisen trial, by using evidence (i.e., immunized testimony) of antecedent similar acts. Thus, Petitioner's immunized testimony (some of which was alleged to be perjurious) at his first appearance was used in its entirety to establish

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[2] See Fed. Rules Evid.R. 404(b)

circumstantially his alleged perjury at his second appearance. Petitioner's testimony from the first and second appearances were then used to establish his perjury at the third appearance. The testimony given on the three separate dates for the most part involved different matters. Similarly, Petitioner's immunized grand jury testimony was used in its entirety to establish before Petitioner's grand jury that his trial testimony was perjurious. As it turned out, Petitioner's immunized grand jury testimony and trial testimony were presented in their entirety to the jury which ultimately convicted him of perjury (four counts) and obstruction of justice (four counts).

A second area pertained to petitioner's complaint that the federal grand jury which indicted him and, ultimately, the petit jury which convicted him, received tainted evidence derived from

truthful leads provided by Petitioner when he gave immunized testimony before the grand jury.

Third, the government's questioning of Petitioner before the Eisen grand jury and, later, at the Eisen trial, was traceable to information and witness identities provided by Petitioner when he testified before a State grand jury and received "transactional immunity" (see N.Y.Crim.Pro.L. §§ 55.10 and 190.40 [McKinneys]) some two years before his three federal grand jury appearances. The New York State grand jury was investigating allegations of fraud in connection with certain personal injury actions, and Eisen firm associates (not Petitioner) were eventually identified as targets and indicted. The indictments were subsequently dismissed because the evidence presented to the State grand jury was found to be legally insufficient (see

N.Y.Crim.Pro.L. §210.30 [McKinneys]). Parenthetically, it should be noted that Petitioner was not charged with perjury, or any related offenses, for his testimony before the State grand jury.

Within the three groupings, Petitioner gave specific examples of impermissible uses (direct and derivative), to which the immunized testimony was put.

The district court denied Petitioner's motion to dismiss without conducting a Kastigar hearing, agreeing with the government that United States v Apfelbaum, 445 U.S. 115 (1980), "eviscerates [Petitioner's] argument" (United States v DeSalvo, 797 F.Supp. 159, 163 [E.D.N.Y. 1992] [Sifton, D.J.]). Affirming the conviction, the Second Circuit, relying on Apfelbaum, supra, agreed with the district court that Petitioner's immunized testimony before the federal grand jury, and at the Eisen trial, was "freely admissible [before

the grand jury that indicted him], limited only by the rules of evidence" (10a). The court also rejected Petitioner's arguments concerning the derivative use of his immunized State grand jury testimony, "'because, at the time he was granted immunity, the privilege would not have protected him against the false testimony that he might later decide to give.' Apfelbaum, 445 U.S. at 130" (12a). Finally, the court concluded that, while the government was free to use Petitioner's immunized trial testimony to prove that he lied at the Eisen trial, the government was not "equally free to use the Eisen trial testimony to prove that [Petitioner] committed perjury in the prior grand jury proceeding" (13a). The court found this use, "[u]nder the unique facts of this case" (14a), to be inconsequential (15a-16a).

In our view, the Second Circuit and other circuit courts of appeals have applied United States v Apfelbaum, supra 445 U.S. 115, in a manner that conflicts with this Court's earlier holding in Cameron v United States, 231 U.S. 710 (1914), as well as the holdings in those circuits antedating Apfelbaum, that a defendant's immunized statements may not be used or derivatively used to establish the defendant's guilt of perjury and/or related offenses, alleged to have been committed after the defendant was granted immunity.

REASONS FOR GRANTING THE WRIT

THE SECOND CIRCUIT AND SEVERAL OTHER CIRCUIT COURTS OF APPEALS HAVE, IN CONFLICT WITH THIS COURT'S EARLIER HOLDING IN CAMERON V UNITED STATES, 231 U.S. 710 (1914), MISAPPLIED UNITED STATES V APFELBAUM, 445 U.S. 115 (1980) TO PERMIT THE USE AND DERIVATIVE USE OF IMMUNIZED TESTIMONY TO ESTABLISH THE DEFENDANT'S GUILT OF PERJURY AND RELATED OFFENSES, ALLEGEDLY COMMITTED AFTER HE WAS GRANTED IMMUNITY.

In Kastigar v United States, 406 U.S. 441, 453 (1972), the Court found the federal use immunity statute, 18 U.S.C. § 6002, to be constitutional, explaining that,

> "such immunity from use and derivative use is coextensive with the scope of the privilege against self incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. *** [The] sole concern [of the privilege] is to afford protection against being 'forced to give testimony' leading to the infliction of 'penalties affixed to *** criminal acts'. Immunity

> from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness" (emphasis in original).

Well before Kastigar's recognition that immunity statutes "have 'become part of our constitutional fabric'" (406 U.S., at p 447), the Court stated that the Fifth Amendment "does not endow the person who testifies with a license to commit perjury" (Glickstein v United States, 222 U.S. 139, 142 [1911]). However,three years later, the Court, in Cameron v United States, 231 U.S. 710 (1914), reversed a perjury conviction where the defendant's immunized truthful testimony, given in connection with a bankruptcy proceeding, was used to establish his perjury at another (later)

bankruptcy proceeding involving the same subject matter. The court explained that,

> "the testimony given in the one bankruptcy proceeding, not tending to establish perjury in that proceeding, should not have been received to establish the crime charged in the other [later] proceeding.
>
> ***
>
> The testimony offered as to what Cameron swore to before the examiner, while not tending to establish the charge of perjury based upon testimony in that instance, did contradict the testimony which he had given before the referee, and directly tended to establish the charge under that indictment. We think to permit the use of the testimony for that purpose was to permit the testimony given in one instance to be used in a criminal proceeding based upon testimony given in the other instance, and therefore to violate the immunity given in § 860 of the Revised Statutes, then in force" (231 U.S., at pp 721, 724; emphasis added; see United States v Tramunti, 500 F.2d 1334, 1344 [2d Cir.], cert. denied, 419 U.S. 710 [1974]).

The Cameron Court rejected the government's arguments that the evidence was competent to demonstrate the context in which the

statements were made and to show that the defendant knew they were false (see, 231 U.S., at p 724).

In United States v Apfelbaum, 445 U.S. 115 (1980), the Court, without mentioning Cameron, rejected the argument that there exists a "distinction between truthful and untruthful statements made during the course of the immunized testimony" (445 U.S., at p 122; emphasis added), and held that,

> "neither the immunity statute nor the Fifth Amendment precludes the use of [the defendant's] immunized testimony at a subsequent prosecution for making false statements, so long as that testimony conforms to otherwise applicable rules of evidence. The exception of a perjury prosecution from the prohibition against the use of immunized testimony may be a narrow one, but it is also a complete one" (445 U.S., at pp 131-2).

Clarifying its broad language, the Apfelbaum court drew a distinction between perjury committed in advance of an immunity

grant and perjury committed after the immunity grant, i.e., "anticipatory perjury" (445 U.S., at p 131), noting that,

> "[f]or even if both truthful and untruthful testimony from the immunized proceeding are admissible in a subsequent perjury prosecution, the exception surely would still be regarded as 'narrow', once it is recognized that the testimony remains inadmissible in all prosecutions for offenses committed prior to the grant of immunity that would have permitted the witness to invoke his Fifth Amendment privilege absent the grant" (445 U.S., at p 128; emphasis added).

Prior to Apfelbaum, the Second and Tenth Circuits, relying in part on Cameron, held that truthful immunized testimony may not be used or derivatively used by the government to establish the defendant's commission of non-contemporaneous i.e. future, perjury or related offenses (see, e.g., United States v Dunn, 577 F.2d 119, 125-6 [10th Cir. 1978], rev'd on other grounds, 442 U.S. 100 [1979]; United States

v Berardelli, 565 F.2d 24, 28 [2d Cir. 1977]; United States v Housand, 550 F.2d 818 [2d Cir. 1977]). The Sixth and Eighth Circuits had held that immunized testimony may be used for any purpose in a perjury prosecution (see Daniels v United States, 196 F. 459, 462-3 [6th Cir. 1912]; Edelstein v United States, 149 F. 636, 642-4 [8th Cir. 1906]).

Since Apfelbaum was decided, several federal courts have held that immunized testimony may not be used to establish antecedent acts of perjury (see United States v Doe, 819 F.2d 11 [1st Cir. 1987]; In re Grand Jury Proceedings (Kopkowski), 819 F.2d 981 [11th Cir. 1987]; United States v Seltzer, 621 F.Supp. 714, 716 [N.D. Ohio 1985], aff'd 794 F.2d 1114 [6th Cir. 1986]), but "may be used to prove perjury committed during the course of separate and subsequent immunized testimony" (United States v Seltzer, supra,

621 F.Supp, at p 716). The Second Circuit in Petitioner's case has apparently abandoned its pre-Apfelbaum position that truthful immunized testimony may not be used to establish subsequent acts of perjury (see ante, pp 20-1).

Though they concurred in the judgment of the Apfelbaum Court, Justices Brennan, Blackmun and Marshall expressed their discomfort with the broader implications of the opinion. Justice Brennan wrote that,

> "I see no reason to explore the terrain which the majority probes via what is in one sense dicta. More particularly, (1) I do not think that the present result compels the conclusion that there are no special constitutional constraints on the use to which immunized testimony may be put in a perjury prosecution, and (2) I am by no means persuaded that the result here would be correct where there is a prosecution for false swearing occurring after the immunized testimony rather than in the course of it (445 U.S., at p 132-3; emphasis added).

Justice Blackmun, joined by Justice

Marshall, wrote that,

> [t]he Court's statement of its holding troubles me primarily for two reasons. First, it apparently makes no distinction between a prosecution for false testimony given under a grant of immunity and a prosecution for false testimony in other contexts. The case concerns the use of immunized testimony to prove that [the defendant] made contemporaneous false statements. There is no occasion to determine whether the immunized testimony could have been used to prove perjury or false statements at some other time. The Court thus states its holding in language that is broader than necessary. At the moment I am not prepared to go so far.
>
> Second, I am not sure I agree that the use of immunized testimony in perjury prosecutions requires no special analysis with respect to the usual rules of evidence. How the testimony is to be used may well be an important factor in determining whether the protection against self-incrimination has been honored. For example, a witness' truthful admission of prior perjury conceivably might be protected from use even though independent evidence of such a prior similar crime was admissible (445 U.S., at pp 133-4).

In Apfelbaum, the government introduced into evidence portions of the defendant's grand jury testimony (not alleged to have been perjurious) in order to put the charged statements in context and to show that the defendant knew they were false (445 U.S., at p 119) -- a rationale which was flatly rejected in Cameron v United States, supra, 231 U.S., at p 724. Thus, the issue decided by the Apfelbaum Court "concern[ed] the use of immunized testimony to prove that respondent made contemporaneous false statements. There [was] no occasion to determine whether the immunized testimony could have been used to prove perjury or false declarations at some other time" (United States v Apfelbaum, supra, 445 U.S., at p 133 [BLACKMUN and MARSHALL, JJ., concurring in the Judgment] [emphasis added]), which is the issue presented in Petitioner's case (cf. Harris v New York,

401 U.S. 222, 224 [1971] ["discussion of *** issue[s] *** not at all necessary to the Court's holding *** cannot be regarded as controlling"]).

The perjury exception to 18 U.S.C. §6002 was described in Apfelbaum as being "narrow *** but *** complete" (445 U.S., at pp 131-2). Read in the context of its particular facts, and the issue presented, Apfelbaum did not, in effect, overrule Cameron and the circuit courts of appeals which have held that a defendant's immunized truthful testimony may not be used or derivatively used to obtain a conviction for perjury or related offenses, alleged to have been committed after the grant of immunity. What was resolved by Apfelbaum was the split among the circuits concerning the admissibility of so much of the defendant's immunized testimony as was essential to establish the corpus delicti

of the offense of perjury (see 445 U.S., at p 119, and 119 n.5).

Nor does the Second Circuit's finding in Petitioner's case, that the use of his immunized trial testimony to prove that he committed perjury in the prior grand jury proceeding was harmless beyond a reasonable doubt (13a - 15a), withstand analysis under Kastigar.

Kastigar flatly stated that the federal use immunity statute "prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness" (406 U.S., at p 454; emphasis in original). The Court added that,

> "[a] person accorded this immunity under 18 U.S.C. § 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. As

> stated in Murphy [v Waterfront Comm'n, 378 U.S. 52, 79 n.18 (1964)]:
>
> 'Once a defendant demonstrates that he has testified under a state grant immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' *** This burden of proof, which we reaffirm as appropriate, is not limited to negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony" (406 U.S., at p 460).

Harmless error analysis has been applied in cases where immunized testimony was "used" in grand jury proceedings (see United States v Rivieccio, supra 919 F.2d at pp 816-7), the remedy being suppression of the tainted evidence, not the dismissal of the indictment. Harmless error analysis has also been employed in cases where immunized testimony was used

(inadvertently) to obtain a search warrant (see United States v Gallo, 859 F.2d 1078 [2d Cir. 1988]).

However, in the case at bar, Petitioner's immunized trial testimony and prior immunized grand jury testimony were admitted into evidence at his trial on federal charges stemming from his immunized testimony without affording Petitioner (as was his right [see United States v Tantalo, 680 F.2d 903, 907 (2d Cir. 1982)]) a Kastigar hearing to determine whether the "prosecutorial authorities *** use[d] the compelled testimony in any respect" (406 U.S., at p 454).

Certiorari should be granted to review the substantial federal question of whether the perjury exception to 18 U.S.C. § 6002 permits the use and derivative use of immunized testimony to establish the defendant's guilt of perjury and related offenses, alleged to have been committed

after the defendant was granted immunity. Also to be reviewed is whether the use of immunized testimony at the defendant's trial to establish his guilt of perjury and obstruction ofjustice before the grand jury, can be deemed harmless error.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
July 11, 1994

Respectfully submitted,

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RICHARD E. MISCHEL, ESQ.
Of Counsel

APPENDIX

OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 650—August Term, 1993

(Argued: December 22, 1993 Decided: April 8, 1994)

Docket No. 93-1330

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK DESALVO,

Defendant-Appellant.

Before:

TIMBERS, WINTER and MCLAUGHLIN,

Circuit Judges.

Frank DeSalvo appeals from a judgment entered in the United States District Court for the Eastern District of New York (Sifton, *J.*) convicting him of perjury and obstruction of justice. DeSalvo argues that, in proving perjury and obstruction, the government violated the Fifth

Amendment and 18 U.S.C. § 6002, the federal immunity statute, by the use of immunized testimony he gave on four separate occasions. He also argues that a sentencing enhancement for "substantial interference with the administration of justice" was unwarranted.

AFFIRMED.

RICHARD E. MISCHEL, New York, NY, *for Defendant-Appellant.*

FAITH E. GAY, Assistant United States Attorney, Brooklyn, NY, (Zachary W. Carter, United States Attorney, Brooklyn, NY, Emily Berger, Assistant United States Attorney, Brooklyn, NY, of counsel), *for Appellee.*

MCLAUGHLIN, *Circuit Judge*:

Frank DeSalvo appeals from a judgment entered in the United States District Court for the Eastern District of New York (Charles P. Sifton, *Judge*) convicting him, after a jury trial, of four counts of perjury, in violation of 18 U.S.C. § 1623(a), and four counts of obstructing justice, in violation of 18 U.S.C. § 1503. Judge Sifton sentenced DeSalvo to 30 months in prison, which reflected a three-level enhancement for causing a "substantial interference with the administration of justice." U.S.S.G. §§ 2J1.2(b)(2) & 2J1.3(b)(2).

In this appeal, DeSalvo challenges the manner in which the government used his prior immunized testimony.

DeSalvo argues that the government violated the federal immunity statute and the Fifth Amendment's self-incrimination clause when it used some of his immunized testimony to prove that other "noncontemporaneous" immunized testimony was false. DeSalvo also challenges the sentencing enhancement.

We affirm.

BACKGROUND

In the early 1980s, Frank DeSalvo was a trial lawyer with the now infamous personal injury firm of Morris J. Eisen, P.C. The Eisen firm dishonored the legal profession by routinely bribing witnesses and manufacturing evidence to win lawsuits or exact favorable settlements. After a federal trial, seven of the firm's lawyers, investigators and administrators were convicted on racketeering charges. *See United States v. Eisen*, 974 F.2d 246 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1619 (1993).

Although DeSalvo himself was not prosecuted along with his colleagues, his central role as an Eisen insider did not escape the attention of the federal prosecutors. DeSalvo's conviction stems from false testimony he gave under oath during the investigation and prosecution of the Eisen defendants. The facts surrounding DeSalvo's testimony are largely undisputed.

A. *DeSalvo's State and Federal Testimony*

In September 1987, a New York state grand jury was empaneled to investigate the Eisen firm. It then compelled DeSalvo's testimony under a grant of transactional immunity. *See* N.Y.C.P.L. § 190.40(2). DeSalvo appeared and testified about his background and employment with the

Eisen firm, and about his participation as a trial lawyer in one Eisen case. DeSalvo was not charged with lying before the state grand jury.

Two years later, a federal grand jury subpoenaed DeSalvo to testify in a federal investigation of the firm. Pursuant to 18 U.S.C. § 6002, Judge Eugene Nickerson granted DeSalvo immunity "as to all matters about which he may be interrogated before the [Eisen] Grand Jury." In all, DeSalvo appeared three times before the Eisen federal grand jury in the fall of 1989. On each occasion, he denied complicity in the Eisen firm's crimes.

In his first federal grand jury appearance on September 14, DeSalvo claimed that it was pure coincidence that his cousin testified as an eyewitness on behalf of Eisen clients in two unrelated personal injury cases.

In his second appearance, one week later, in testimony about a different case, DeSalvo denied colluding with two firm investigators who, during a personal injury trial, fabricated an account of a defense witness's whereabouts. This account persuaded the trial judge that the witness was available to be called and thus his deposition testimony should be excluded.

In his third and final appearance before the Eisen grand jury, DeSalvo denied ever knowing that a witness who testified in yet another of his cases was the mother of the Eisen firm's office manager.

In August 1990, the federal grand jury indicted the Eisen defendants, not including DeSalvo. The government, however, called DeSalvo to testify at the Eisen trial. DeSalvo appeared on December 20, 1990, and declined to answer the questions put to him, asserting his Fifth Amendment privilege against self-incrimination. In

response, Judge Sifton entered a second federal immunity order pursuant to 18 U.S.C. § 6002, covering "all matters about which [DeSalvo] may be interrogated at the [Eisen] trial." DeSalvo's trial testimony essentially tracked his federal grand jury testimony.

B. *The Proceedings Below*

Following the government's successful prosecution of DeSalvo's colleagues, a federal grand jury indicted DeSalvo for perjury and obstruction of justice in connection with the testimony he gave during his three appearances before the federal grand jury (the "Eisen grand jury") and the trial jury (the "Eisen trial jury"). The government maintained that DeSalvo had repeatedly lied when he denied participating in any wrongdoing at the Eisen firm.

Before trial, DeSalvo moved to dismiss the indictment under the principles of *Kastigar v. United States*, 406 U.S. 441, 460 (1972) (government has the burden to show that the evidence it proposes to use "is derived from a legitimate source wholly independent of the compelled testimony"). DeSalvo essentially argued that the federal grand jury which indicted him for perjury and obstruction should not have been presented with his prior state and federal immunized testimony. DeSalvo claimed that since his indictment alleged perjury committed on *four* separate occasions (*i.e.*, three appearances before the Eisen grand jury and one appearance before the Eisen trial jury), there was a danger that the grand jury weighing the perjury charges against him might have considered immunized testimony he gave in one appearance to prove the falsity of testimony he gave in another appearance. He also claimed that the government improperly used evidence derived from his immunized *state* grand jury testimony to

indict him for lying before the *federal* grand and trial juries. The district court (Sifton, *J.*) dismissed DeSalvo's multifaceted argument, and denied DeSalvo's request for a *Kastigar* hearing, on the authority of *United States v. Apfelbaum*, 445 U.S. 115 (1980). *See United States v. DeSalvo*, 797 F. Supp. 159 (E.D.N.Y. 1992).

The federal immunity statute expressly permits immunized testimony to be used in "a prosecution for perjury." 18 U.S.C. § 6002. Relying on the Supreme Court's interpretation of the perjury exception in *Apfelbaum*, Judge Sifton reasoned that "only 'the otherwise applicable rules of evidence' limit the use of immunized testimony in a perjury prosecution." *DeSalvo*, 797 F. Supp. at 163 (quoting *Apfelbaum*, 445 U.S. at 131-32).

Accepting *arguendo* DeSalvo's premise—*i.e.*, that the three appearances before the *same* grand jury under the *same* immunity order constituted three *separate* grand jury proceedings—Judge Sifton nevertheless rejected DeSalvo's claim of prejudice because DeSalvo could point to no statement in the indictment that the government would prove perjurious by reference to inconsistent testimony given at another time. 797 F. Supp. at 163. Finally, Judge Sifton saw no reason why the government could not use leads derived from DeSalvo's state grand jury testimony to prove perjury committed before the federal juries. Accordingly, Judge Sifton denied DeSalvo's motion. The jury convicted DeSalvo on four counts of perjury and four counts of obstruction.

In calculating DeSalvo's sentence under the Sentencing Guidelines, Judge Sifton raised DeSalvo's base offense level from 12 to 15 because he found that DeSalvo's perjury and obstruction "resulted in substantial interference with the administration of justice." U.S.S.G. §§ 2J1.2(b)(2)

(obstruction of justice); 2J1.3(b)(2) (perjury). Specifically, Judge Sifton found that DeSalvo's perjury and obstruction caused a substantial expenditure of government resources that would not have been needed had DeSalvo testified truthfully from the start.

DeSalvo now appeals.

DISCUSSION

I. *Use of Immunized Testimony*

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Consistent with the constitutional guarantee, a court may compel testimony under a grant of immunity so long as the testimony, and any evidence derived therefrom, is not thereafter used against the witness "in any criminal case, *except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.*" 18 U.S.C. § 6002 (emphasis added). *See Kastigar*, 406 U.S. at 453. Despite the express exception permitting use of immunized testimony in a subsequent perjury prosecution, DeSalvo believes that the government violated 18 U.S.C. § 6002 and the Fifth Amendment when it indiscriminately used *all* of his immunized testimony to indict and convict him on multiple and overlapping perjury charges. To assess DeSalvo's nebulous, not to say inscrutable, grievance, we must plumb the depths of the perjury exception to the immunity statute, and parse DeSalvo's argument into manageable bytes.

Analysis begins with *United States v. Apfelbaum*, 445 U.S. 115 (1980), where the Supreme Court endeavored to harmonize the varying approaches taken by the lower

courts as to the permissible uses of a witness's immunized testimony in a perjury prosecution. The Court rejected the view of the Seventh and Third Circuits, which had held that only the "*corpus delicti*" or "core" of the false statements charged in the perjury indictment could be used against the witness. 445 U.S. at 119-20. The Court also rejected the approach of our Court, typified by *United States v. Berardelli*, 565 F.2d 24, 28 (2d Cir. 1977), which had held that *false* immunized statements were admissible in a perjury prosecution, but *truthful* immunized statements were not. 445 U.S. at 119 n.5. In sweeping terms, the Court held that in a perjury prosecution, "neither the [immunity] statute nor the Fifth Amendment requires that the admissibility of immunized testimony be governed by any different rules than other testimony." 445 U.S. at 117.

A perjury indictment is not carte blanche to admit immunized testimony in all such prosecutions, however. As *Apfelbaum* explained, the perjury exception of 18 U.S.C. § 6002 is a "narrow" one precisely because immunized testimony "remains inadmissible in all prosecutions for offenses committed prior to the grant of immunity that would have permitted the witness to invoke his Fifth Amendment privilege absent the grant." *Apfelbaum*, 445 U.S. at 128.

Accordingly, while *Apfelbaum* settled the dispute about *how much* of a witness's immunized testimony may be used in a prosecution for perjury committed during the course of that testimony (answer: all of it), it did not change the constitutional rules governing *when* such compelled testimony may be used: The rule remains that none of a witness's immunized testimony may be used in a prosecution for a crime (including perjury) that was "committed prior to the grant of immunity that would have permitted the witness to invoke his Fifth Amend-

ment privilege absent the grant." *Apfelbaum*, 445 U.S. at 128. In other words, nothing in *Apfelbaum* changed the principle that a "witness is entitled to claim the Fifth Amendment privilege if [his testimony] might reveal perjury in a prior proceeding." *In re Corrugated Container Antitrust Litig.*, 644 F.2d 70, 75 n.7 (2d Cir. 1981).

An example may help to illuminate the intersection of these rules and the permissible and impermissible uses of immunized testimony to prove perjury. Assume that a witness makes three sworn statements in a federal proceeding under a grant of use immunity. If one of those three statements is false, and the government then prosecutes for perjury, *Apfelbaum* teaches that neither the Fifth Amendment nor the immunity statute prohibits the admission of the remaining two statements in the perjury prosecution. (The trial judge could, of course, exclude those statements on other evidentiary grounds.)

In addition, it is likely that the government could use all three of the witness's statements in a prosecution for a perjury committed *after* the proceeding in which the three sworn statements were given. This is so because, at the time the witness was granted immunity in the earlier proceeding, the danger that he might commit perjury in some future proceeding "is not by itself sufficient to create a substantial and real hazard that permits invocation of the Fifth Amendment." *Apfelbaum*, 445 U.S. at 131 (citations and internal quotations omitted). Consistent with the Fifth Amendment, however, the government could not use *any* of the three statements to prove that the witness had committed perjury in some *prior* proceeding.

In sum, the Fifth Amendment: (1) permits the unrestricted use of a witness's immunized testimony in a prosecution for perjury committed during the course of that

immunized testimony; (2) does not permit a witness to invoke the privilege on the ground that he anticipates committing perjury sometime in the future; and (3) prohibits the use of immunized testimony in a prosecution for any offense—including perjury—committed before the grant of immunity if the witness would have had a valid claim of privilege absent the grant.

With these principles as our template, we turn to consider the government's use of DeSalvo's immunized testimony.

A. *Use of DeSalvo's Federal Grand Jury Testimony*

DeSalvo contends that Judge Sifton should not have allowed the government to present to DeSalvo's grand and petit juries all the testimony DeSalvo earlier gave in his three appearances before the Eisen grand jury. We agree with Judge Sifton that *Apfelbaum* disposes of this argument. Under *Apfelbaum*, such testimony is freely admissible, limited only by the rules of evidence. *Apfelbaum*, 445 U.S. at 131. No evidentiary objection having been raised, all of DeSalvo's immunized testimony given before the Eisen grand jury—both truthful and false, core and peripheral—was properly admitted to prove that DeSalvo committed perjury and obstruction during the course of that testimony.

We reject DeSalvo's argument that the government is constrained in its use of his grand jury testimony simply because the testimony was given on three different days. DeSalvo's testimony was given pursuant to the same immunity order and in the same grand jury proceeding. Accordingly, all the testimony DeSalvo gave before the Eisen grand jury was properly admitted in this prosecution for perjury and obstruction committed during the course of that proceeding.

B. *Use of DeSalvo's State Grand Jury Testimony*

DeSalvo's argument concerning the government's use of the immunized testimony he gave before the state grand jury in 1987 is more elusive. He concedes that testimony given under a state grant of transactional immunity earns only use immunity in a federal court. *See United States v. Gallo*, 863 F.2d 185, 190 (2d Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989). He claims, however, that federal prosecutors derived critical leads from that immunized testimony, and then used that evidence against him in the subsequent federal perjury prosecution. He concludes, therefore, that he was entitled to a *Kastigar* hearing to determine whether the government obtained the evidence to indict him from sources wholly independent of his immunized testimony. Again, we are not persuaded.

When a witness surrenders his constitutional right to remain silent in exchange for use immunity, the government keeps its end of the bargain by not thereafter using the witness's testimony in a way that would violate the Fifth Amendment right he was forced to relinquish. *See Apfelbaum*, 445 U.S. at 130. "While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader." *Kastigar*, 406 U.S. at 453. In federal court, therefore, DeSalvo receives the benefit of his state immunity bargain so long as the government's use of his immunized testimony does not exceed the scope of the Fifth Amendment privilege existing at the time he testified before the state grand jury. To measure the scope of that privilege, we ask whether DeSalvo would have been "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Marchetti v. United States*, 390 U.S. 39, 53 (1968) (citations and internal quotations omitted). *See*

United States v. Quatermain, Drax, 613 F.2d 38, 41-43 (3d Cir.), *cert. denied*, 446 U.S. 954 (1980).

The Fifth Amendment would not have protected DeSalvo against the use of his state grand jury testimony in this future perjury prosecution: The risk that DeSalvo might be prosecuted for lying to a federal jury in 1989 would have been far too speculative to permit him to invoke the privilege in 1987. *See Apfelbaum*, 445 U.S. at 131 ("[A] future intention to commit perjury or to make false statements . . . is not by itself sufficient to create a substantial and real hazard that permits invocation of the Fifth Amendment.") (citations and internal quotations omitted). Accordingly, the Fifth Amendment does not prevent the use of DeSalvo's 1987 state grand jury testimony in this subsequent perjury prosecution "because, at the time he was granted immunity, the privilege would not have protected him against false testimony that he later might decide to give." *Apfelbaum*, 445 U.S. at 130. *Accord United States v. Seltzer*, 794 F.2d 1114, 1120 (6th Cir. 1986) ("[W]e hold that neither the fifth amendment nor the immunity statute prevent[ed] use of appellant's 1981 immunized testimony at his trial for perjury before the grand jury in 1983 because, at the time appellant was granted immunity in 1981, the privilege would not have protected him against false testimony he might later decide to give in either 1981 or 1983."), *cert. denied*, 479 U.S. 1054 (1987).

C. *Use of the Eisen Trial Testimony*

Most troublesome is the government's use of the immunized testimony DeSalvo gave before the Eisen *trial* jury in December, 1990. Without question, all of that testimony was admissible to prove that DeSalvo lied during the course of that trial. *See Apfelbaum*, 445 U.S. at 117.

However, the instant prosecution was not limited to charges of perjury committed during the course of his Eisen trial testimony; DeSalvo was also charged with committing perjury in a prior proceeding (*i.e.*, the Eisen grand jury proceeding). The question, then, is whether the government was equally free to use the Eisen trial testimony to prove that DeSalvo committed perjury in the prior grand jury proceeding. We believe it was not.

DeSalvo's first federal immunity order, signed by Judge Nickerson, immunized only DeSalvo's grand jury testimony. No doubt, had Judge Sifton not entered the second immunity order on December 20, DeSalvo would have been well within his rights to refuse to testify at the Eisen trial, given the real danger that truthful answers would reveal that he had committed perjury before the Eisen grand jury: "[T]he giving of truthful testimony on the second occasion could surely trigger investigation of whether the original testimony was false. . . . This is a reasonable cause for apprehension, and supports the claim of privilege." *United States v. Housand*, 550 F.2d 818, 823 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977). *See In re Morganroth*, 718 F.2d 161, 166 (6th Cir. 1983) ("When a witness is asked a question in a subsequent proceeding, the answer to which could show that he has already committed the crime of perjury in a prior proceeding, his refusal to answer is permissible almost by the definition of self-incrimination. The witness is still criminally accountable for his earlier perjury.").

Because the Fifth Amendment thus prohibited the government from compelling DeSalvo's testimony at the Eisen trial, the Eisen trial testimony—given in exchange for a grant of immunity—was inadmissible in a prosecution for perjury committed before the Eisen grand jury. As explained above, the government may not use a witness's

immunized testimony in a prosecution for committing perjury in a prior proceeding. *See United States v. Doe*, 819 F.2d 11, 11 (1st Cir. 1987) ("Appellant's immunized testimony in a future appearance before the grand jury cannot be used as evidence to prove a charge of perjury in giving false testimony in his prior appearance."); *United States v. Watkins*, 505 F.2d 545, 546 (7th Cir. 1974) (the perjury exception to the federal immunity statute "refers to future perjury, future false statements or future failure to comply with the immunity order, rather than previous acts"). Therefore, while the Eisen trial testimony was admissible to prove those counts of the indictment charging perjury and obstruction before the Eisen *trial* jury, that testimony was *not* admissible to prove those counts charging perjury and obstruction before the (earlier) Eisen *grand* jury. *See, e.g., United States v. Seltzer*, 621 F. Supp. 714, 716 (N.D. Ohio 1985) (improper to use "1983 immunized grand jury testimony in order to find a basis for prosecuting the defendant for the 1981 alleged perjury"), *later proceeding United States v. Seltzer*, 794 F.2d 1114 (6th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987).

Having identified an error, we turn to the question of remedy. Under the unique facts of this case, we do not believe that the error we have uncovered warrants any relief. When the government violates the Fifth Amendment and 18 U.S.C. § 6002 by using immunized testimony, "generally the remedy for the violation is the suppression of the tainted evidence at trial, not a dismissal of the indictment." *United States v. Rivieccio*, 919 F.2d 812, 816 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2852 (1991). And, we have held that the improper use of immunized testimony at trial is subject to harmless error analysis. *See United States v. Gallo*, 859 F.2d 1078, 1082-83 (2d Cir. 1988), *cert. denied*, 490 U.S. 1089 (1989); *but see*

generally Paul A. Murphy, Comment, *Use Immunity and the Fifth Amendment: Maybe the Second Circuit Should Have Remained Silent*, 63 St. John's L. Rev. 585 (1989).

We are convinced that the error in admitting the Eisen trial testimony at DeSalvo's trial was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967); *Gallo*, 859 F.2d at 1082. Notably, this is not a case in which the government proved the falsity of the prior testimony by reference to subsequent, inconsistent testimony. *Cf., e.g., Cameron v. United States*, 231 U.S. 710 (1914). Nor does DeSalvo specifically allege that the government used his Eisen trial testimony to prove the falsity of his Eisen grand jury testimony. To the contrary, DeSalvo testified *consistently* before the Eisen grand and trial juries; in both appearances, he denied knowing about and participating in the Eisen firm's racketeering.

Accordingly, there is no danger that DeSalvo's jury considered the testimony he gave before the Eisen trial jury to prove that he lied before the Eisen grand jury. Where, as here, the subsequent immunized testimony is the same as the earlier immunized testimony, a *Kastigar* hearing would simply have confirmed what was obvious to Judge Sifton: the government must have had an independent source to discover and prove that the earlier testimony was false. Therefore, we find that the use of DeSalvo's immunized testimony had absolutely no potential to disadvantage him.

We note, moreover, that DeSalvo never specifically objected to the use of the Eisen trial testimony. This may have been because, as Judge Sifton observed, the government was not attempting to prove the falsity of some testimony by reference to testimony given at a different proceeding. *See* 797 F. Supp. at 163. Indeed, if DeSalvo

truly feared that prejudicial spillover would result from the joinder of charges that he lied before the Eisen trial jury, he could have moved to sever those counts in the district court. Having failed to do so, he cannot complain about the joinder of these counts for the first time on appeal. *See, e.g., United States v. Tillem*, 906 F.2d 814, 827 (2d Cir. 1990).

II. *Sentencing*

DeSalvo's sentencing challenge need not detain us long. The Sentencing Guidelines allow the base offense level applicable to perjury and obstruction of justice to be increased three levels if the offense "resulted in substantial interference with the administration of justice." U.S.S.G. §§ 2J1.2(b)(2) (obstruction of justice); 2J1.3(b)(2) (perjury). Application Note 1 to sections 2J1.2(b)(2) & 3(b)(2) provides that substantial interference with the administration of justice includes "the unnecessary expenditure of substantial governmental or court resources." Our standard of review is well settled: "The factors underlying a sentence need only be proved by a preponderance of the evidence, and the district court's findings of fact will not be disturbed unless clearly erroneous." *United States v. Jones*, 900 F.2d 512, 521 (2d Cir.) (citations omitted), *cert. denied*, 498 U.S. 846 (1990). *See* 18 U.S.C. § 3742(e). DeSalvo contends that there is "no basis in the record" to support Judge Sifton's finding, and that our opinion in *Jones* requires a remand here. We cannot agree.

In *Jones*, we vacated and remanded for resentencing because the sentencing judge in that case "did not make any specific finding that Jones' perjury had resulted in any substantial expenditure of governmental resources." *Jones*, 900 F.2d at 521-22. We went on to observe, how-

ever, that "[t]he government need not particularize a specific number of hours expended by government employees" and that "[i]n some cases, when the defendant has concealed evidence and is the only known source of information, substantial interference with the administration of justice may be inferred." *Id.* at 522.

Judge Sifton made sufficient factual findings on the record at sentencing. Judge Sifton presided over the Eisen trial, and explained that his findings reflected not only the expenses associated with DeSalvo's trial, but also the expenditures associated with the Eisen trial. Without doubt, truthful and complete testimony by DeSalvo—who was the second highest ranking lawyer with the Eisen firm and a trial lawyer on cases which were the subject of several counts in the Eisen indictment—would have saved the government substantial investigative and trial expenses. Because Judge Sifton's conclusion was amply supported by the record, there is no basis to vacate the sentence.

CONCLUSION

(1) Neither the Fifth Amendment nor the federal immunity statute prohibited the government from using all of the testimony DeSalvo gave in his three appearances before the Eisen federal grand jury to prove he committed perjury during the course of that proceeding. (2) It was not improper for the government to use leads derived from DeSalvo's state grand jury testimony to prove perjury committed before the federal juries because the risk of self-incrimination was too speculative to have invoked the privilege at the time of the state proceeding. (3) The government should not have used DeSalvo's immunized Eisen trial testimony in a prosecution for perjury that

included charges that DeSalvo committed perjury in a prior proceeding. However, under the unique circumstances of this case, the violation did not disadvantage DeSalvo. (4) The record supports the sentencing enhancement.

We have considered all of DeSalvo's remaining arguments, including his challenges to the overall fairness of the trial and the prosecutor's summation, and find them meritless.

AFFIRMED.

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st day of May one thousand nine hundred and ninety-four

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UNITED STATES OF AMERICA

Appellee,

v

FRANK DESALVO

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant Frank Desalvo

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, CLERK
By: Carolyn Clark Campbell
Carolyn Clark Campbell
Chief Deputy Clerk